Supreme Court, U.S.
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No. 97-824

In The

Supreme Court of the United States

October Term, 1997

ALFRED SHORT,

Petitioner,

vs.

CITY OF WEST POINT, MS and RICHARD STRIPLING, individually and in his official capacity as Fire Chief of the City of West Point,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Statement of the Facts	1
Reasons for Denying the Writ	5
I. The Writ Should Be Denied Inasmuch As The Fifth Circuit Was Correct In Its Holding That The Petition Clause Of The First Amendment Requires A Showing Of A Public Interest.	5
II. The Court Of Appeals Properly Held That Petitioner's EEOC Charge Was Not A Matter Of Public Concern.	7
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Ayoub v. Texas A&M Univ., 927 F.2d 834 (5th Cir.), *cert. denied*, 502 U.S. 817 (1991)	9, 10
Brinkmeyer v. Thrall Independent School Dist., 786 F.2d 1291 (5th Cir. 1986)	6
Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)	6, 8

Contents

Page

Day v. South Park Ind. Sch. Dist., 768 F.2d 696 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101, 106 S. Ct. 883, 88 L. Ed. 2d 918 (1986) 5, 6

Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979) ... 7, 8

Kirkland v. Northside Independent School Dist., 890 F.2d 794 (5th Cir. 1989) 9

McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985) 6, 7

Rathjen v. Litchfield, 878 F.2d 836 (5th Cir. 1989) 5, 6

San Filippo v. Bongiovanni, 30 F.3d 424 (3rd Cir. 1994) 5

Stewart v. Parish of Jefferson, 951 F.2d 681 (5th Cir. 1992) 9

Terrell v. Univ. of Texas Sys. Police, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S. Ct. 948, 93 L. Ed. 2d 997 (1987) 9

United States Constitution Cited:

First Amendment 1, 5, 6, 7, 8, 10, 11

Contents

Page

APPENDIX

Appendix A — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Mississippi, Eastern Division Filed December 19, 1996 ..... 1a

STATEMENT OF THE CASE

On January 21, 1997, the United States District Court for the Northern District of Mississippi summarily dismissed Petitioner's First Amendment petition claim. In dismissing his claim, the district court found that any request for protection under the petition clause of the First Amendment required that the Petitioner come forward with proof of a public concern. The court then held that the claim of Petitioner, his EEOC charge of racial discrimination, only touched upon a personal and private matter and that, therefore, Petitioner's claim under the petition clause of the First Amendment should be dismissed as a matter of law. Petitioner timely appealed and the Fifth Circuit, for essentially the same reasons as the district court, affirmed the dismissal. Petitioner then filed this Petition for Writ of Certiorari.

His petition raises two arguments. First, Petitioner claims that a writ should be granted because circuits are divided on the issue of whether the First Amendment's petition clause is subject to the public concern analysis. Second, he argues that a writ should be granted because the Fifth Circuit has ignored precedent from this court construing the term public concern. As is shown below, there is no cause for review.

STATEMENT OF THE FACTS

Petitioner Alfred Short began working at the City of West Point Fire Department on January 16, 1992, as a Firefighter/ EMT. (R. at p. 147). At the time he began employment, he resided at Route 4, Box 196-C in Macon, Noxubee County, Mississippi. One of the minimum qualifications for the position with the fire department was that "Plaintiff [be] a resident of Clay County and reside no more than three (3) miles outside the city limits of West Point." (R. at pp. 59-60, newspaper advertisement recognizing requirement R. at p. 81). The City hired Petitioner

with the understanding that he would move into Clay County as soon as possible. (R. at p. 61).

Carradine Young was serving as Fire Chief for the City when Short joined the department. Young repeatedly reminded Short that his position with the fire department required him to move his residence to Clay County. (R. at pp. 61-63). In January or February of 1993, Short bought a house in Northgate Subdivision of the City of West Point. Respondent Richard Stripling took over for Carradine Young in April of 1994. (R. at p. 92). Although Short had purchased a house, it was common knowledge that he was not actually living in the house and Chief Stripling, as Young had previously, continued to urge Short to comply with the residence requirement. (R. at pp. 109-11; 112-14).[1]

In July of 1994, a position as Engineer/Pump Operator opened at the fire department. (R. at p. 113). Short applied for the job. After thorough consideration of the qualifications of each of the applicants, Chip Jones and Tony Lawson were chosen for the promotions in early October. (R. at pp. 113-14). Jones and Lawson were chosen over Short because they had several more years of experience with the fire department and because both had worked as backup pump operators in the past. (R. at pp. 94, 98-99, 113-14).[2]

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1. As further support for Respondents' belief that Petitioner did not actually live in Clay County, at all times relevant to this lawsuit, his vehicles had Noxubee County plates, he was registered to vote in Noxubee County, his driver's license showed Noxubee County as his home and his employment records reflected that he lived in Noxubee County. (R. at pp. 124-25; W-2's, R. at pp. 77-80).

2. At the time of the promotions, Jones had been working with the City of West Point Fire Department for nine years. He had served as a backup pump operator for some eight years. Lawson had been with the (Cont'd)

Short filed a claim with the EEOC on November 1, 1994, charging race discrimination against the City and Chief Stripling for failing to promote him. (R. at p. 84). The EEOC dismissed Short's claim of race discrimination on June 26, 1995. (Commission Determination R. at p. 85). Short received his Notice of a Right to Sue letter with the EEOC determination, but did not file a lawsuit under Title VII based on the promotion decision. (R. at p. 86).

Prior to the pump operator position opening, Chief Stripling had been questioning Short about his living arrangements and his intention to comply with the residence requirement for firefighters of the City of West Point. (R. at pp. 61-63, 112, 95-96). Short claimed he had moved into a house he bought in Northgate Subdivision in or around May of 1994, even though his family still resided in their Macon dwelling. (R. at p. 63, 147). After investigation by the Police Department, Chief Stripling determined that Short was not actually living in the residence. (R. at p. 113). On January 6, 1995, Dewel Brasher, the City's Chief Administrative Officer, wrote Short a letter setting out the repercussions of failing to comply with the residence requirement and, again, pleading with Short to comply. (R. at p. 72; letter, R. at p. 87). After meeting with Short in March of 1995, some five months after Short's EEOC charge, City Mayor Kenny Dill informed Short that he would be suspended effective immediately and that the Mayor would recommend his termination at the next Board of Aldermen meeting based on Short's continued refusal to move into Clay

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(Cont'd)
department for six years and eight months and had worked as a pump operator on an interim basis for approximately seven months. In contrast, Short had only been with the department for two years and eight months and had no experience in driving a fire truck or pump operation. Short's continued refusal to move his residence inside Clay County was also considered. (R. at pp. 95, 113-14).

County. (R. at pp. 75-76; letter, R. at p. 89). The letter specifically stated that the reason for this action was for his failure to comply with the long-standing City policy, and a condition of his original employment, that all employees of the West Point Fire Department be residents of Clay County or relocate to Clay County. (*Id.*).[3]

At the April 11 hearing before the Board of Mayor and Selectmen, Alfred Short was terminated by a unanimous vote of the Board members. (R. at p. 128).

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3. Short claimed in his Petition that "[o]fficials of the City of West Point expressed their disapproval of the filing of the EEOC charge." (Petition at p. 3). He went on to quote statements taken from his own deposition wherein he claimed that city officials spoke of their disapproval of his EEOC charge. Although irrelevant to the issues before this Court, the Respondent would note that city officials denied making any such statements and the record evidence shows that, both before and after Short's EEOC charge, city officials warned Short about the residence requirement and gave him ample opportunity to comply.

For example, the record evidence establishes that Dewel Brasher, one of the individual's Short claims expressed disapproval with his filing of the EEOC charge, wrote Short a letter in early January, some three months after Short's EEOC charge, and gave him an opportunity to comply with his residence obligations. (R. at p. 72; letter R. at p. 87). Short simply refused to comply and the City was forced to finally act.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED INASMUCH AS THE FIFTH CIRCUIT WAS CORRECT IN ITS HOLDING THAT THE PETITION CLAUSE OF THE FIRST AMENDMENT REQUIRES A SHOWING OF A PUBLIC INTEREST.

In affirming the district court, the Fifth Circuit held that Short must show that his underlying EEOC race charge involved a matter of public concern in order to be cognizable under the petition prong of the First Amendment. Petitioner argues that the "public concern" analysis should not be applied to cases involving the petition clause of the First Amendment and, therefore, should not be applied to his petition claim here. In support of his argument, he cites the Court to the Third Circuit decision of *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994), which directly contradicts previous decisions of the Fifth Circuit and every other circuit court to consider the issue.[4]

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4. In *San Filippo*, the court recognized that each circuit to previously consider the issue had held that a public employee who alleges that he or she was disciplined in retaliation for having filed a lawsuit or grievance against his or her employer does not state a First Amendment claim unless the lawsuit or grievance addressed a matter of public concern. *San Filippo* at 439-40. The decision even listed in a footnote cases from other jurisdictions which required proof of a public concern in First Amendment petition cases. *Id.* at 440 n.19. The cases of *Day v. South Park Ind. Sch. Dist.*, 768 F.2d 696 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101, 106 S. Ct. 883, 88 L. Ed. 2d 918 (1986), and *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989), were noted in the footnote as cases where the Fifth Circuit required plaintiff's to show a public concern under the petition clause of the First Amendment.

Petitioner argues that the Fifth Circuit has misapplied *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), and that the public interest "balancing test" is inappropriate when the employee's speech consists of filing an EEOC charge. However, after *Connick*, this Court recognized that there is no distinction between the petition clause of the First Amendment and its other provisions. In *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), the Court held that:

> The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater protection to statements made in a petition . . . than other First Amendment expressions.

McDonald, 472 U.S. at 485, 105 S. Ct. at 2791 (internal citations omitted). Petitioner's attempt to distinguish his petition claim from other protected First Amendment expressions has been rejected by this Court and there is no cause for further review.

All circuits, other than the Third, have specifically held that a public employee seeking redress under the right to petition prong of the First Amendment is required to establish a public interest. More particularly, the Fifth Circuit requires a plaintiff bringing a First Amendment action to establish a public interest where he claims retaliation for filing a grievance or a lawsuit. *See, e.g., Rathjen*, 878 F.2d at 842; *Day*, 768 F.2d at 701-03; *Brinkmeyer v. Thrall Independent School Dist.*, 786 F.2d 1291, 1296 (5th Cir. 1986).

All courts other than the Third Circuit have specifically recognized that a public employee seeking redress under the

right to petition prong of the First Amendment must establish a public interest. This Court in *McDonald* held that statements made in a petition should have no greater protection than any other First Amendment expressions. Petitioner's petition rests on arguments previously addressed and rejected by this Court and does not warrant review.

Of equal significance, as recognized by the Petitioner, Title VII specifically provides for protection from retaliation for filing an EEOC charge. A Title VII retaliation claim, as opposed to a First Amendment retaliation claim, does not require a public interest showing. *Petitioner had the opportunity to pursue his retaliation claim under Title VII by filing a charge of discrimination with the Equal Employment Opportunity Commission, but failed to do so.* (Petition at p. 4 n.2; Memorandum Opinion dismissing Title VII Retaliation Claim at pp. 7-9, Opinion and Order of Dismissal attached as Appendix A). *In other words, he had a readily available remedy but neglected to avail himself of the opportunity to pursue the same.*

II.

THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER'S EEOC CHARGE WAS NOT A MATTER OF PUBLIC CONCERN.

Petitioner argues that the Fifth Circuit erred when it held that his EEOC claim here did not involve matters of public concern. He claims that charging a public body with race discrimination is a matter of public concern and that no further proof of public interest is necessary. His argument is without merit.

Petitioner relies on the decision of *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 58 L. Ed. 2d 619, 99

S. Ct. 693 (1979), in support of his argument. In *Givhan*, the Court held that First Amendment protection may apply even when a public employee arranges to communicate privately with his employer, rather than to express his views publicly. *Id.*, 439 U.S. at 415-16. The only issue in *Givhan* was the form of communication, the subject matter of her complaint was not at issue. Under the facts and circumstances at the time of her complaint, Givhan's statements concerning the school district's allegedly racially discriminatory policy involved a matter of public concern.[5] *See Connick*, 461 U.S. at 146 (Court recognized that the subject matter of Givhan's statements was not at issue, but noted that her statements concerning the school district's allegedly racially discriminatory policy was clearly a public concern). Here, in contrast to *Givhan*, the subject matter of Short's EEOC claim was personal and private in nature. The private communication of the complaint was only one factor that supported dismissal of Short's claim. As distinguished from the plaintiff in *Givhan*, not only was Short's complaint lodged in private but, the subject matter of Short's complaint was private, he brought the charge for personal reasons, and the relief he sought (a promotion) was personal in nature. Short's EEOC complaint was private and personal and not protected by the First Amendment.

Courts have consistently determined the issue of public versus private concern on a case-by-case basis.

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5. The Court in *Givhan* was considering a retaliation claim that involved a school teacher's (employee) statements concerning allegedly racially discriminatory policies at the Western Line Consolidated School District (employer). At the time of the petitioner's complaint and termination, the district was the subject of a desegregation order entered by the United States District Court of Mississippi. *Givhan*, 439 U.S. at 411. The content, context and form of Givhan's petition claim was of public concern.

> The issue of whether an employee's speech involves a matter of "public concern" is a slippery inquiry, one which defies precise definition. It thus requires a case-by-case analysis, with careful consideration of the content, context and form of the statement.

Stewart v. Parish of Jefferson, 951 F.2d 681, 683 (5th Cir. 1992) (citing *Kirkland v. Northside Independent School Dist.*, 890 F.2d 794, 798 (5th Cir. 1989).

In *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S. Ct. 948, 93 L. Ed. 2d 997 (1987), the court discussed the importance of a case-by-case analysis in the public employment context:

> Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. **Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in his role as employee. In making the determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.**

Id. at 1362 (internal footnotes omitted). Petitioner's argument that discrimination claims are "as a matter of law" of public interest without any further proof of a public motive directly contradicts precedent and should be rejected.

In *Ayoub v. Texas A&M Univ.*, 927 F.2d 834 (5th Cir.), *cert. denied*, 502 U.S. 817 (1991), which is controlling here, the Fifth Circuit addressed an argument almost identical to Short's

argument here. In *Ayoub*, plaintiff sued the University under the First Amendment alleging that he was relocated in retaliation for bringing an the EEOC charge of discrimination based on the pay-scale in place at the University. He claimed the University was discriminating against him because of his national origin and that such discrimination was of public concern. The court found that it was clear that Ayoub's speech did not involve a matter of public concern and focused only on individual compensation. *Id.* at 837. The court summarized by stating that

> the indisputable facts found in the record remain that Ayoub consistently spoke not as a citizen upon matters of public concern, but rather as an employee upon matters of only personal interest.

Id. Ayoub's claims are virtually identical to those of Short here.

There is no evidence that Short expressed concern about anything other than his own promotion to the Engineer/Pump Operator position. His motivation was clearly personal and he has offered no proof to the contrary. He was concerned solely with his personal employment situation. He has never alleged that there was a generalized pattern or policy of discrimination in the West Point Fire Department. Although race discrimination can be a matter of public concern, in the context presented here by Short, the discrimination complained of was purely personal and private and addressed only his personal employment condition. Therefore, he has no retaliation claim under the First Amendment and this claim was properly dismissed.

CONCLUSION

The Petitioner requests that the Court review the issue of whether the petition prong of the First Amendment requires proof

of a public interest. As discussed above, this Court has previously held that statements in a petition, here an EEOC charge, are no more protected than other First Amendment expressions. Therefore, as found by all circuits other than the Third, plaintiffs bringing claims under the petition clause of the First Amendment must prove a public interest. As this Court has previously considered and rejected similar arguments, there is no need for review of this question and this petition should be denied.

Secondly, this Court and all circuit courts have consistently determined proof of a public interest on a case-by-case basis. The content, context and form of Petitioner's EEOC charge here was purely private and personal in nature. His EEOC charge was primarily as an employee and not as a citizen and review is not warranted. Simply put, this Petition raises no issues that warrant review and should be denied.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION FILED DECEMBER 19, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CAUSE NO. 1:95CV359-D-D

ALFRED SHORT

PLAINTIFF

VS.

CITY OF WEST POINT, MS and RICHARD STRIPLING, Individually and in his Official Capacity as Fire Chief of the City of West Point

DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court upon the motion of the defendants for summary judgment in their favor against the plaintiff's claims. The plaintiff has sued the City of West Point, Mississippi and Richard Stripling, individually and in his official capacity as fire chief of West Point, alleging violations of Title VII of the Civil Rights Act of 1964, the First Amendment to the United States Constitution, 42 U.S.C. §§ 1981 and 1983. Plaintiff's Complaint ¶ VIII. The defendants moved for dismissal or, in the alternative, summary judgment on the grounds that (1) this court lacks jurisdiction over the plaintiff's Title VII claims due to the plaintiff's failure to exhaust his administrative remedies; (2) the plaintiff's First Amendment claim should be

dismissed because Title VII offers the exclusive remedy for retaliation for filing an EEOC claim; (3) the claims against defendant Stripling in his individual capacity have no factual basis; (4) the claims against defendant Stripling in his official capacity are duplicative since the City of West Point is a properly named defendant; and (5) the defendants are otherwise entitled to a judgment as a matter of law on all claims. The plaintiff has responded and this motion is ripe for determination.

FACTUAL BACKGROUND[1]

The City of West Point ("the City") hired plaintiff Alfred Short as a firefighter and an emergency medical technician (EMT) for the West Point Fire Department in January 1992. Although one of the qualifications for employment required firefighters to "[b]e a resident of Clay County and reside no more than three (3) miles outside the City Limits of West Point," the plaintiff resided in Macon, Noxubee County, Mississippi, when he began his employment with the City. Exh. 2 att. Short Depo., July 17, 1996. The City hired him with the understanding that he would soon move into Clay County. Short Depo., July 17, 1996 at 34.

In January or February of 1993, Short bought a house in the Northgate Subdivision of the City and moved into it in early spring of 1994.[2] Shortly afterwards, in April 1994, defendant

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1. In a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party. *Matagorda County v. Russel Law*, 19 F.3d 215, 217 (5th Cir. 1994). The court's recitation of the facts in this case reflects this rule.

2. The defendants vehemently dispute this date and contend that neither Short nor his family ever resided in West Point until after the time relevant to this lawsuit. Defendants' Brief in Support of Motion for Summary Judgment at 5.

Stripling replaced Caradine Young as Fire Chief for the City. In July 1994, an Engineer/ Pump Operator position opened at the fire department. The qualifications for this promotion were listed[3] and the plaintiff applied for the job. He sat for the written test and also participated in an oral interview.

Short scored the highest on the written exam out of the six applicants. Nevertheless, Chip Jones and Tony Lawson, white co-employees of the plaintiff and fellow applicants, were awarded the promotion in October 1994. The plaintiff filed a claim with the EEOC the first of November leveling a race discrimination charge against the City and Chief Stripling for failure to promote the plaintiff. The EEOC dismissed Short's claim of race discrimination on June 6, 1995, after finding that Jones and Lawson were more qualified due to the consideration of factors other than the written exam such as experience and job performance.

Even before the pump operator position opened up, Chief Stripling had been questioning the plaintiff about his living arrangements and his intention to comply with the residence requirements for firefighters of the City. The plaintiff claimed that he had moved into the house he bought in the Northgate Subdivision on or around March 1994, even though his family still resided in their Macon dwelling. Defendant Stripling

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3. Short testified by deposition that factors such as seniority and experience were not initially listed as weighing heavily in the promotion determination. Short Depo., July 17, 1996 at 47. However, he does not dispute that the final percentages allotted each factor were posted prior to the date of the written exam. *Id.* The applicant's written test score and his years of experience counted 70%, while leadership abilities and the oral interview accounted for the remaining 30%. Exh. 1 att. Sripling Aff., Oct. 4, 1996.

requested the police to investigate the matter and report back to him. Apparently dissatisfied with the reports, Dewel Brasher, the City's Chief Administrative Officer, wrote the plaintiff a letter of warning setting out the repercussions of failing to abide by the residence requirement. After meeting with the plaintiff in March 1995 to discuss the matter further, City Mayor Kenny Dill informed Short that he was suspended effective immediately and that the Mayor would recommend his termination to the City Board based on the plaintiff's abrogation of the residence requirement. Per such recommendation, the Board voted to terminate the plaintiff's employment on April 11, 1995. The plaintiff filed this cause of action on November 24, 1995.

LEGAL DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Vera v. Tue*, 73 F.3d 604, 607 (5th Cir. 1996). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Brothers v. Klevenhagen*, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact

to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Federal Sav. & Loan Ins. v. Krajl*, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. *Banc One Capital Partners Corp. v. Kniepper*, 67 F.3d 1187, 1198 (5th Cir. 1995); *Matagorda County v. Russel Law*, 19 F.3d 215, 217 (5th Cir. 1994).

II. CLAIMS ADDRESSED

As an initial matter, the court addresses the matter of which of the plaintiff's claims are properly before it pursuant to the defendants' motion for summary judgment or dismissal. The plaintiff asserts that the defendants have moved for summary judgment only as to the retaliation claims and not as to any claim in regard to the failure to promote. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 9. While the defendants' motion itself only references the retaliation claims, it is apparent from reading the defendants' supporting brief that the defendants intended their motion as one requesting dismissal of the entire case. Although the defendants apparently considered the plaintiff's complaint as only properly raising a retaliation claim, the defendants provided adequate notice to the plaintiff of their position that the plaintiff's Title VII claim of race discrimination for failure to promote is procedurally barred. Defendants' Brief in Support of Motion for Summary Judgment at 4 & n.3, 13 n.8. The court shall address this claim in addition to the plaintiff's retaliation claims. The defendants argue in their rebuttal brief that the plaintiff did not raise a § 1981 claim in his complaint for failure to promote. Although the plaintiff certainly highlighted his failure to promote claim as being

brought under Title VII, the court is of the opinion that the plaintiff provided adequate notice of his intention to also state a claim under § 1981.[4] However, because the defendants did not move for summary judgment as to this claim, except in their rebuttal brief,[5] the court shall not address it.

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4. Paragraph Eight of the Complaint provides:

> This Court has federal question jurisdiction under 28 USC 1343 to address claims under the Civil Rights Act of 1964, under the United States Constitution, Amend. 1, under 42 USC Sec. 1981, and under 42 USC Sec. 1983.

Plaintiff's Complaint ¶ 8.

5. Even if this court were to address the issue, the undersigned does not believe that the plaintiff's § 1981 claim is barred. The defendants contend that the § 1981 claim should be dismissed because

> "where the plaintiff has alleged violations of both Title VII and § 1981, the court as [a] rule, will consider an alternative remedy brought under § 1981 only if violation of that statute can be made out on grounds different from those available under Title VII. . . . Plaintiff has raised no different grounds here. Accordingly, his § 1981 race claim . . . should be dismissed."

Defendants' Rebuttal Brief at 5. The Fifth Circuit, in *Parker v. Mississippi St. Dep't of Pub. Welfare*, stated that specific consideration of alternate remedies for employment discrimination (i.e., § 1983 and § 1981) is only necessary if a violation may be made out on grounds different from those under Title VII. 811 F.2d 925, 927 n.3 (5th Cir. 1987). However, the appellate court later clarified that language:

> In *Parker* we did no more than limit our appellate review

(Cont'd)

(Cont'd)

> of the denial of Title VII relief to the facts alleged in support of that claim, doing so because the claims alleged under Title VII and § 1981 were provable by the same facts. Thus a finding of liability or non-liability under one statute satisfied the other. . . . *Parker* does not stand for the proposition, nor could it properly do so, that a claimant alleging racial discrimination in an employment setting is limited to recovery under Title VII.

Hernandez v. Hill Country Tele. Co-op., 849 F.2d 139, 142-43 (5th Cir. 1988). The *Hernandez* Court cited the Supreme Court opinion of *Johnson v. Railway Express Agency* extensively. *See* 421 U.S. 454, 95 S. Ct. 1716, 44 L.Ed.2d 295 (1975). The plaintiff in *Johnson* had filed both a Title VII claim and a § 1981 claim. The Court noted that

> [d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. . . . [T]he remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of [42 U.S.C. § 1981] and the two procedures augment each other and are not mutually exclusive. . . .
>
> We generally conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.

Johnson, 421 U.S. at 459, 461, 44 L.Ed.2d 301, 302. The court will not bar the plaintiff's § 1981 failure to promote claim simply because the same claim under Title VII is procedurally barred when § 1981 itself contains no procedural prerequisites and is a valid and independent avenue for relief.

Appendix A

III. TITLE VII CLAIMS

A. Failure To Promote

It is undisputed that the plaintiff filed a charge with the EEOC on November 1, 1994, alleging race discrimination in regard to the City's and Chief Stripling's failure to promote the plaintiff. On June 6, 1995, the EEOC dismissed the charge and notified Short of his right to sue in federal court. Short had ninety (90) days from the receipt of his right to sue letter to file suit in federal court under Title VII for race discrimination in regard to his failure to promote claim. The plaintiff did not file suit until November 24, 1995 — more than 90 days subsequent to the receipt of the EEOC notice. The plaintiff concedes this fact.[6] Plaintiff's Brief in Opp. to Mot. for Summary Judgment at 9 n.1. As such, the plaintiff is barred from bringing a claim for race discrimination under Title VII in regard to the defendants'

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6. It appears the plaintiff concedes the dismissal of his Title VII failure to promote claim. Although aware of the defendants' position that the plaintiff's Title VII failure to promote claim is procedurally barred, the plaintiff failed to argue or present proof that the claim could proceed under the auspices of waiver or estoppel. *Espinoza v. Missouri Pacific R. Co.*, 754 F.2d 1247, 1249 n.1 (5th Cir. 1985) (noting 90-day limit not jurisdictional, but subject to waiver and estoppel). Furthermore, as noted *supra* when addressing the jurisdictional question of this court's authority to entertain the plaintiff's Title VII retaliation claim, the plaintiff argued that the court has ancillary jurisdiction over the claim due to the plaintiff's § 1981 claim for race discrimination. The plaintiff failed to mention any Title VII claim for failure to promote to which a retaliation claim could attach itself. Plaintiff's Brief in Opp. to Mot. for Summary Judgment at 11. The court is of the opinion that the plaintiff had notice that the defendants were moving for summary judgment as to the Title VII failure to promote claim and that no genuine issue of material fact exists which precludes a ruling on this claim.

failure to promote him. This claim of the plaintiff shall be dismissed.

B. Retaliation

In addition to a failure to promote claim under Title VII, the plaintiff has brought a retaliation claim under Title VII alleging the defendants fired him in retaliation to his filing a claim with the EEOC. The plaintiff did not file a claim with the EEOC regarding the allegedly retaliatory termination of his employment. As such, the defendants contend that this court lacks jurisdiction over the plaintiff's retaliation claim brought pursuant to Title VII.

Courts lack jurisdiction to consider claims under Title VII unless the aggrieved party has first exhausted his administrative remedies. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995); *National Ass'n of Govern. Emp. v. City Pub. Serv.*, 40 F.3d 698, 711 (5th Cir. 1994); *Clark v. Kraft Foods, Inc.*, 18 F.3d 1279, 1279 (5th Cir. 1994). The Fifth Circuit has recognized one exception to this exhaustion requirement that is relevant in the case at bar. In *Gupta v. East Tex. State Univ.*, the appellate court held that

> it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim *when it grows out of an administrative charge that is properly before the court.*

654 F.2d 411, 411 (5th Cir. Unit A Aug. 1981) (emphasis added); *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 479 (5th Cir. 1991).

The plaintiff contends that "ancillary" jurisdiction is not the only avenue through which this court may properly entertain his retaliation claim. As neither *Barrow* nor *Gupta* explicitly stated that ancillary jurisdiction was the **sole** source of a court's authority over a retaliation claim not filed with the EEOC, the plaintiff takes the position that 28 U.S.C. § 1343 also provides this court with jurisdiction over such a claim. However, the plaintiff directs this court's attention to no authority for that proposition and the court's own research unearthed no such holding. Section 1343 merely grants district courts original jurisdiction over civil rights actions. However, 42 U.S.C. § 2000e-5(f) specifically confers upon district courts jurisdiction over Title VII claims. *McMiller v. Bird & Son, Inc.*, 68 F.R.D. 339, 340 (W.D. La. 1975) (noting 28 U.S.C. § 1343 conferred jurisdiction over § 1981 claim while 42 U.S.C. § 2000e-5(f) conferred jurisdiction over Title VII claim). Section 1343 may not be used as an end run around the prerequisites for jurisdiction contained in Title VII. Otherwise, the court can discern no reason why Congress would include prerequisites such as those contained within § 2000e-5(f) if § 1343 could also bestow jurisdiction without the plaintiff complying with the listed requirements.

In the alternative, the plaintiff submits that this court has ancillary jurisdiction over his retaliation claim because the court has jurisdiction over his race claim under 42 U.S.C. § 1981. The § 1981 claim has no impact on this court's jurisdiction over the plaintiff's retaliation claim under Title VII. As the *Gupta* Court held and the *Barrow* Court subsequently reaffirmed, a district court has ancillary jurisdiction to hear a retaliation claim not filed before the EEOC " 'when it grows out of an *administrative charge* that is *properly* before the court.' " *Barrow*, 932 F.2d at 479 (first emphasis added) (quoting *Gupta*,

654 F.2d at 414). This court interprets *Gupta* and *Barrow* as setting out the narrow holding that a retaliation claim not filed with the EEOC must attach itself to an otherwise properly filed Title VII claim in order for the court to have jurisdiction to hear it. The fact that race discrimination claims other than those filed pursuant to Title VII are properly before the court does not vest the court with authority over a retaliation claim not filed with the EEOC. As the court noted *supra*, the plaintiff has no administrative charge properly before the court. Thus, this court has no ancillary jurisdiction to hear the plaintiff's Title VII retaliation claim and it shall be dismissed.

IV. FIRST AMENDMENT CLAIM

A. Title VII and § 1983

The defendants have moved for the dismissal of Short's First Amendment claim on the basis that Title VII provides the exclusive remedy for a retaliation claim. The plaintiff disputes this argument and submits that Title VII does not bar a separate claim under 42 U.S.C. § 1983[7] for violation of a constitutional right. In his Complaint, the plaintiff stated that

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7. Section 1983 provides in relevant part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

> Additionally, firing Plaintiff because he filed an EEOC charge violated his free speech rights and the right to petition the government for redress of grievances, protected by the United States Constitution, Amend. 1.

Plaintiff's Complaint ¶ IX. The defendants contend that "[a]lthough Plaintiff attempts to label these claims as First Amendment claims, they are essentially retaliation claims cognizable only under Title VII." Def.'s Brief in Support of Motion at 11. In support of this statement, the defendants cite several cases. *See, e.g., White v. General Servs. Ad.*, 652 F.2d 913, 917 (9th Cir. 1981); *Patel v. Derwinski*, 778 F. Supp. 1450, 1457 (N.D. Ill. 1991); *Washington v. United States Postal Serv.*, 1990 WL 119506 (N.D. Ill. 1990); *Munoz v. Orr*, 559 F. Supp. 1017, 1019-20 (W.D. Tex. 1983). Each of the cited cases, however, stand for the proposition that Title VII is a **federal** employee's exclusive remedy in this type of a situation. This court agrees that "[t]itle VII provides the exclusive remedy for employment discrimination claims raised by federal employees." *Jackson v. Widnall*, 99 F.3d 710, 715 (5th Cir. 1996) (citing *Brown v. General Servs. Admin.*, 425 U.S. 820, 835, 96 S. Ct. 1961, 1969, 48 L.Ed.2d 402 (1976); *Rowe v. Sullivan*, 967 F.2d 186, 189 (5th Cir. 1992)). One of the shortfalls of the defendants' argument is that Mr. Short was not a federal employee, but instead was employed by the City of West Point. *See Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1575 (5th Cir. 1989).

The defendants' second shortfall is their misinterpretation of the recent Fifth Circuit opinion in *Jackson v. City of Atlanta, Tx.*, 73 F.3d 60 (5th Cir. 1996). In that case, the court reaffirmed its holding in *Irby v. Sullivan*[8] that a "violation of Title VII cannot

8. 737 F.2d 1418 (5th Cir. 1984).

also support a § 1983 suit." *Jackson*, 73 F.3d at 63. The defendants read this language as precluding the plaintiff's First Amendment claim brought under § 1983. In *Jackson*, the basis for the plaintiff's § 1983 claim was the alleged violation of Title VII. *Id.* at 61 and 63. The court held that the § 1983 claim should be dismissed since § 1983 does not create any substantive rights itself but only provides a remedy for the violation of federal substantive rights and "§ 1983 is not available when 'the governing statute provides an exclusive remedy for violations of its terms.' " *Id.* at 63 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28, 101 S. Ct. 1531, 1545-46, 67 L.Ed.2d 694 (1981)). Because Jackson's § 1983 claim hinged on a violation of Title VII and Title VII provides an exclusive remedy for violations of its terms, the court dismissed the § 1983 claim.

Mr. Short's § 1983 claim does not hinge on an alleged violation of Title VII. Instead, the substantive federal right he submits the defendants infringed upon is his freedom of speech protected under the First Amendment. As noted by the *Jackson* Court, a plaintiff may

> pursue a remedy under § 1983 as well as under Title VII when the employer's conduct violates both Title VII and a *separate constitutional or statutory right.*

Id. at 63 n.13 (emphasis in original). The First Amendment sets out a constitutional right separate from what Title VII protects and the plaintiff is not precluded by *Jackson* from asserting a § 1983 claim under these facts.

B. Public Concern

In their rebuttal memorandum, the defendants assert in the

alternative that the plaintiff's First Amendment claim should be dismissed because the plaintiff's EEOC complaint does not involve a matter of public concern. As noted *supra*, the plaintiff alleges that the defendants violated his First Amendment rights by firing him in retaliation for his filing an EEOC complaint against them. As the plaintiff was a public employee at the time in question, the First Amendment only protects his speech if it involves a matter of public concern. *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1050 (5th Cir. 1996). In determining whether certain speech falls into that protected classification, courts must look to the content, form, and context of the speech. *Wallace*, 80 F.3d at 1050 (citing *Thompson v. City of Starkville*, 901 F.2d 456, 461 (5th Cir. 1990)). If Short's speech was primarily in his role as employee as compared to primarily in his role as citizen, the speech generally is not of public concern. *Id.*

> The courts will not interfere with personnel decisions when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest.

Id. (quoting *Page v. DeLaune*, 837 F.2d 233, 237 (5th Cir. 1988); *Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)).

After examining the plaintiff's EEOC charge of discrimination, it appears that this argument of the defendants may indeed have merit. *See Ayoub v. Texas A & M Univ.*, 927 F.2d 834, 836-38 (5th Cir.), *cert. denied*, 502 U.S. 817 (1991). However, the defendants did not provide the plaintiff with notice of this basis for dismissal of the plaintiff's First Amendment retaliation claim. As pointed out *supra*, the defendants raised this issue only in their rebuttal brief. Thus, the court is of the

opinion that the plaintiff should have an opportunity to respond to this matter and shall grant him additional time in which to do so before the court again takes up this issue.

V. CLAIMS AGAINST DEFENDANT STRIPLING

The defendants also submit that the claims against defendant Fire Chief Stripling in his individual and official capacities should be dismissed. The defendants argue that the official capacity claims should be dismissed because the City is a properly named defendant and such claims are merely duplicative. The plaintiff did not address this issue and the court finds this contention well taken and shall dismiss the claims against defendant Stripling in his official capacity.

As to the retaliation claim against Chief Stripling in his individual capacity, the defendants submit that (1) the Chief did not make the recommendation nor the final decision of dismissal of the plaintiff, and in the alternative (2) Stripling, as a public official in Mississippi, is entitled to qualified immunity for discretionary acts which he performs in his official capacity as Fire Chief. The court is of the opinion that genuine issues of material fact exist which preclude the court from granting judgment as a matter of law as to the plaintiff's First Amendment retaliation claim against Stripling in his individual capacity. Although Stripling may not have participated in the final decision to dismiss the plaintiff, there appears to be a genuine issue of material fact as to whether Stripling's actions proximately contributed to the termination of the plaintiff's employment with the City. As such, Stripling is not entitled to a judgment as a matter of law as to the plaintiff's retaliation claim against him in his individual capacity. *See Boddie v. City of Columbus*, 989 F.2d 745 (5th Cir. 1993).

In the alternative, the defendants submit that Stripling is entitled to state law qualified immunity because any decisions relative to Short's employment were discretionary acts which Stripling performed in his official capacity. Stripling's claim of entitlement to state law immunity is unavailing as violative of the Supremacy Clause. *Howlett v. Rose*, 496 U.S. 356, 375-83, 110 L.Ed.2d 332, 353-58, 110 S. Ct. 2430 (1990) (finding state law immunities have no force in § 1983 suits "over and above" those provided in § 1983); *see also Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law."); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 75 (2d Cir. 1992) (same); *Walker v. Norris*, 917 F.2d 1449, 1458 (6th Cir. 1990) ("State law cannot provide immunity with regard to section 1983 claims."); *Hufford v. Rodgers*, 912 F.2d 1338, 1341 (11th Cir. 1990) ("[S]tate immunity . . . has no application to claims in federal court under section 1983."), *cert. denied*, 499 U.S. 921, 111 S. Ct. 1312, 113 L.Ed.2d 246 (1991). At this juncture, Stripling is not entitled to a judgment as a matter of law in his favor against the plaintiff's First Amendment retaliation claim.

VI. RETALIATION CLAIM AGAINST THE CITY

The defendants also assert that the City is entitled to summary judgment against the plaintiff's First Amendment retaliation claim. As with the claim against Stripling in his individual capacity, the court finds that genuine issues of material fact exist which prevent the entry of a judgment as a matter of law on this claim. To make out a *prima facie* case of retaliation, the plaintiff must demonstrate that: (1) he participated in a statutorily protected activity; (2) he received an adverse employment action; and (3) a causal connection exists between

the protected activity and the adverse action. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995). The defendants submit that the plaintiff has failed to create a material fact issue as to the third element of causation. However, in a summary judgment motion, the burden is initially on the movant to demonstrate that no genuine issues of material fact exist which preclude the entry of a judgment as a matter of law. The court is of the opinion that the defendants have not met their burden in this case. Short testified by deposition that defendant Stripling told him he was "digging a hole for himself" by filing with the EEOC and that Dewel Brasher, the City's Chief Administrative Officer, informed Short that the City was planning on talking with Short about his residence but refused to do so after he filed a claim. Short Depo., July 17, 1996 at 86, 88. These comments alone indicate that summary judgment is inappropriate at this time.[9]

VII. PUNITIVE DAMAGES

The final matter before the court is the argument by the defendants that the plaintiff is not entitled to punitive damages as a matter of law and this claim should be dismissed. Punitive damages are indeed recoverable under §§ 1983 and 1981. *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L.Ed.2d 632 (1983); *Hale v. Fish*, 899 F.2d 390, 404 (5th Cir. 1990). However, the awarding of such damages is not available against a municipal defendant. *City of Newport v. Fact Concerts, Inc.*,

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9. The defendants further submit that they have articulated a legitimate nonretaliatory reason for their decision to terminate the plaintiff's employment, that being his alleged refusal to comply with the residency requirement. The court is of the opinion, however, that the plaintiff has demonstrated that genuine issues of material fact exist as to whether this reason is pretextual and whether his employment would have been terminated "but for" his protected activity.

453 U.S. 247, 267, 101 S. Ct. 2748, 2760, 69 L.Ed.2d 616 (1981) ("A municipality . . . can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself."); *Webster v. City of Houston*, 735 F.2d 838, 860 n.52 (5th Cir. 1984); *Walters v. City of Atlanta*, 803 F.2d 1135, 1148 (11th Cir. 1986). As such, the plaintiff's punitive damages claim against the City of West Point shall be dismissed. The defendants also moved for summary judgment as to the punitive damages claim against Chief Stripling individually on state immunity grounds. However, as the court set out *supra*, state law immunity defenses are no bar to federal liability and Chief Stripling is not entitled to a judgment as a matter of law on this basis. The court declines to address the factual merits of the plaintiff's punitive damages claim against Stripling in his individual capacity because the defendants did not move for a judgment as a matter of law on this predicate. However, the defendants are entitled to summary judgment in their favor in regard to the punitive damages claim against the municipal defendant and those claims shall be dismissed.

CONCLUSION

The court finds the motion of the defendants for summary judgment partially well taken and it shall be granted in part and denied in part. The court is of the opinion that the plaintiff properly raised a claim under § 1981 in his Complaint and the defendants did not move for summary judgment as to this claim. As such, the court shall not address the merits of the plaintiff's § 1981 claim of failure to promote and it shall be allowed to stand. The defendants did provide adequate notice to the plaintiff of their position with regard to the plaintiff's Title VII claim for failure to promote and the court finds that this claim is

procedurally barred and it shall be dismissed. As there is no administrative charge properly before the court to which the plaintiff's Title VII retaliation claim could attach, dismissal as to this claim is also proper. The defendants' argument against the survival of the plaintiff's First Amendment retaliation claim on the basis that the plaintiff's speech did not involve a matter of public concern appears to have potential merit; however, the plaintiff shall have an opportunity to respond to this matter before the court addresses it. As to the factual merits of the plaintiff's First Amendment claim, the court is of the opinion that genuine issues of material fact exist which preclude granting a judgment as a matter of law in favor of the City or defendant Stripling on this claim. Finally, the City is entitled to a judgment as a matter of law as to the plaintiff's claim for punitive damages against it and this claim shall be dismissed.

A separate order in accordance with this opinion shall issue this day.

THIS 17th day of December 1996.

s/ Glen H. Davidson
United States District Judge

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CAUSE NO. 1:95CV359-D-D

ALFRED SHORT

PLAINTIFF

VS.

CITY OF WEST POINT, MS and RICHARD STRIPLING, Individually and in his Official Capacity as Fire Chief of the City of West Point

DEFENDANTS

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, the court upon due consideration of the defendants' motion for summary judgment finds the motion partially well taken and shall grant it in part and deny it in part. Therefore, it is ORDERED that:

1) the plaintiff's racial discrimination claim of failure to promote brought pursuant to Title VII is hereby DISMISSED. This order does not address the plaintiff's failure to promote claim brought pursuant to 42 U.S.C. § 1981.

2) the plaintiff's retaliation claim brought pursuant to Title VII is hereby DISMISSED.

Appendix A

3) the plaintiff's punitive damages claims against the municipal defendant City of West Point are hereby DISMISSED.

4) the claims of the plaintiff against defendant Richard Stripling in his official capacity are hereby DISMISSED as duplicative.

5) the plaintiff shall have fifteen (15) days from the date of this order in which to respond to the defendants' argument for dismissal of the plaintiff's First Amendment retaliation claim on the basis that the plaintiff's speech did not involve a matter of public concern. The defendants shall then have five (5) days in which to submit their rebuttal and the court shall take up this matter again after that time.

6) the remainder of the defendants' motion for summary judgment is hereby DENIED.

7) the court clerk shall file as part of the court record the defendants' memorandum brief in support of their motion to dismiss or for summary judgment, the plaintiff's memorandum brief in opposition to the defendants' motion for summary judgment, and the defendants' rebuttal memorandum brief.

All memoranda, depositions, affidavits and other matters considered by the court in partially granting the defendant's motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED this 17th day of December 1996.

s/ Glen H. Davidson
United States District Judge